Case No. **S219919**

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JOSHUA HAVER, individually and as successor-in-interest to LYNNE HAVER, deceased, et al.,

Plaintiffs, Appellants, and Petitioners,

vs.

BNSF RAILWAY COMPANY,

Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FIVE, CASE NO. B246527; LOS ANGELES COUNTY SUPERIOR COURT, NO. BC435551, THE HONORABLE RICHARD E. RICO

AMICI CURIAE BRIEF OF THE CALIFORNIA CHAMBER OF COMMERCE AND THE CIVIL JUSTICE ASSOCIATION OF CALIFORNIA IN SUPPORT OF DEFENDANT AND RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Codes and Statutes

Articles, Texts and Miscellaneous

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INTRODUCTION: INTEREST OF AMICUS AND IMPORTANCE OF ISSUE

The Civil Justice Association of California (CJAC) and the California Chamber of Commerce (CalChamber)[1] welcome the opportunity to address the principal issue this case presents:

> **Does an employer whose business involves the use or manufacture of asbestos-containing products owe a duty of care to members of an employee's household who could be affected by asbestos dust brought home on the employee's clothing?**

The trial court sustained defendant's demurrer to the complaint, thus answering "No" to this query; and a majority appellate court opinion affirmed that judgment, explaining, "Under the emerging majority view, the court dismisses the suit, holding that an employer can have no legal duty to an employee's spouse who never stepped foot inside the employer's facility." *Haver v. BNSF Railway Co.* (2014) 172 Cal.Rptr.3d 771, 775, quoting 4 Cetrulo, *TOXIC TORTS LITIGATION GUIDE* (2013) § 33:6, fn. omitted.

[1] By application accompanying this brief, CJAC and CalChamber ask the Court to accept it for filing.

Amici agree with both courts' decisions and share two concerns about what an opinion reversing them threatens: first, imposition of an additional deleterious impact on a segment of the business community – *i.e.*, those who manufactured or used asbestos containing products – already hard-hit by what the Supreme Court referred to as an "elephantine mass"[2] of lawsuits;[3] and second, a rule of law that essentially imposes "absolute" and "limitless" liability on defendants who make or use a toxin to which others are exposed, but have no relationship with the defendants, have never been on defendants' premises, or purchased or used any of defendants' products.

CJAC is a 37-year-old non-profit organization of businesses, professional associations and financial institutions dedicated to educating the public about ways to make our civil liability laws more fair, economical, and certain. Toward this end, we regularly petition government for redress when it comes to determining who pays, how much, and to whom when the conduct of some occasions harm to others. Our efforts include participation as amicus curiae in cases raising a variety of issues related to liability for asbestos exposure.[4]

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[2] *Ortiz v. Fibreboard Corp.* (1999) 527 U.S. 815, 821.

[3] Asbestos litigation will eventually cost nearly $265 billion, which surpasses the litigation costs for tobacco and Agent Orange. Michelle J. White, *Asbestos and the Future of Mass Torts* (2004) 18 *J. Econ. Persp.* 192 (noting the total costs of Agent Orange litigation ($180 million) and tobacco litigation ($246 billion)). Of the $70 billion spent on asbestos litigation up to a decade ago, plaintiffs recovered $29 billion compared to legal counsels' $41 billion benefit. When compared to the $13 billion collected by litigators in tobacco's $246 billion litigation, the disparity between asbestos litigation costs and other mass torts is startling.

[4] See, e.g., *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335 [manufacturers of valves and pumps used on aircraft carrier owed no duty of care to naval officer to prevent asbestos-related disease, and thus manufacturers were not subject to negligence liability for officer's mesothelioma]; *McCann v. Foster Wheeler LLC* (2010) 48 Cal.4th 68; *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th
(continued...)

CalChamber is a nonprofit business association with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state. For over one hundred years, CalChamber has been the voice of California business. While CalChamber represents several of the largest corporations in California, seventy-five percent of its members have one hundred or fewer employees. CalChamber acts on behalf of the business community to improve the state's economic and employment climate by representing business on a broad range of legislative, regulatory, and legal issues. CalChamber participates as amicus curiae only in cases, like this one, that have a significant impact on businesses.

Amici believe that if defendant is held to owe a duty to plaintiff in the circumstances alleged, it will not only cinch defendant's liability but that of others in analogous positions to third party bystanders by effectively converting the law of negligence into *absolute liability*.[5] This liability will apply *a fortiori* to other manufacturers of toxic containing products, employers whose employees work with those products,

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[4](...continued)
1235; *Kesner v. Superior Court*, S219534; and *Grigg v. Owens-Illinois, Inc.*, A139597.

[5] Only "negligence" is asserted here, which is less onerous on defendants than "strict liability," a tort "which extend[s] liability for defective product design and manufacture beyond negligence but short of absolute liability." *Daly v. General Motors Corp.* (1978) 20 Cal.3d 725, 733." 'Strict liability' and 'absolute liability' . . . are not synonymous, and it is imperative that courts, attorneys and legal commentators understand how to properly distinguish them. The primary difference between the two concepts is that while there are defenses available to strict liability, there are apparently no defenses that will bar recovery on an absolute liability claim. While no federal or state decision has attempted to define and distinguish the two concepts, the well-recognized definition of 'absolute' includes 'having no restriction, exception, or qualification.' Strict liability, on the other hand, is limited in scope by such legal concepts as assumption of risk and comparative fault." Frank C. Woodside III, et al., *Why Absolute Liability Under Rylands v. Fletcher Is Absolutely Wrong!* (2003) 29 *U. DAYTON L. REV.* 1, 6; footnote omitted.

and owners who lease buildings to those manufacturers and employers. "[W]hile public policy supports holding manufacturers [of defective products] strictly liable, absolute liability would simply be *unfair*." Clinton H. Scott, *Defective Condition or Unreasonably Dangerous under the Tennessee Products Liability Act: Just What Does it Mean?* (2003) 33 *U. MEM. L. REV.* 945, 984; italics added. "[A]bsolute liability is unfair and unduly limits individual freedom by imposing liability on people for harms they can only prevent by refraining from acting altogether." Bernard W. Bell, *The Wide World of Torts: Reviewing Franklin & Rabin's Tort Law and Alternatives* (2001) 25 *SEATTLE U.L. REV.* 1, 8.

This transmutation of negligence law into absolute liability by a finding of duty here is implied in the dissenting opinion from the appellate court, which states the view that "foreseeability [i]s the primary factor in determining duty." *Haver*, *supra*, 172 Cal.Rptr.3d at 777. Significantly, once duty is found on this basis, the remaining elements for negligence liability fall into place as easily as toppling dominoes. These elements are duty, breach of the duty, causation, and damages. *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 614.

Working backward from these listed elements in the circumstances of this case shows why the threshold determination of a duty owed is the linch-pin to an essentially automatic determination of liability. Damage, for instance, is a given: the plaintiff contracted mesothelioma, a cancer often – but not solely – caused by her exposure to asbestos.

Next comes the element of *causation*, both *actual* (cause-in-fact) and *legal*, what used to be known as *proximate*. Actual causation follows as certain as night follows day because of the relaxed causation test created by *Rutherford v. Owens-Illinois, Inc.* (1997) 16

Cal.4th 953. Under *Rutherford*, all a plaintiff need show is that the asbestos was a substantial factor contributing to the . . .*risk* of developing cancer." *Id.* at 969, 977; italics added. Significantly, plaintiffs have been able to recover against defendants based on expert testimony that "even a *single exposure* to respirable asbestos fibers was a substantial factor in increasing [the plaintiff's] risk of developing mesothelioma." *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th, 962, 977, fn. 5; italics added. As former asbestos plaintiffs' lawyer Richard "Dickie" Scruggs suggested about the practical effect of such a relaxed causation test, it engenders an "endless search for a solvent bystander."[6]

Then we have *legal causation*, for which there is respectable authority that the court, as with the duty issue, can make a determination rather than the jury.[7] But whether the satisfaction of this element is determined by court or jury is of little moment if the argument advanced by plaintiff is accepted, for the finding of "duty" is, as plaintiff contends and the dissenting appellate opinion states, based largely on

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[6] Richard Scruggs & Victor Schwartz, *Medical Monitoring and Asbestos Litigation – A Discussion with Richard Scruggs and Victor Schwartz*, 1-7:21 *MEALEY'S ASBESTOS BANKR. REP.* 5 (Feb. 2002).

[7] According to former Chief Justice Traynor, if "the extent of defendant's liability is determined in terms of '[legal] cause,' it should be recognized that the issue is one of law . . . . In so far as the issue of [legal] cause is concerned . . . with limitations imposed upon liability as a matter of public policy, the issue is for the court." *Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 222-23.

Traynor was not alone in this view. Professor Leon Green has long argued that proximate or legal cause is generally a duty question to be discharged by the court. See Green, *Duties, Risks, Causation Doctrines* (1962) 41 TEX. L. REV. 42, 58-64; Green, *The Causal Relation in Negligence Law* (1962) 60 MICH. L. REV. 543, 562-74. Numerous judicial opinions concur, recognizing that the policy part of legal cause "asks the larger, more abstract question: *should* the defendant be held responsible for . . . causing the plaintiff's injury?" *Maupin v. Widling* (1987) 192 Cal.App.3d 568, 573. See also *Evan F. v. Hughson United Methodist Church* (1992) 8 Cal.App.4th 828, 834-35.

"forseeability," a primary factor in determining *legal causation*. See, e.g., *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 772 ("[T]he touchstones of proximate [legal] cause analysis are causation in fact and *foreseeability of harm*."); italics added. It would be surprising if the determination of duty based on foreseeability did not, if only from force of the principle of consistency, lead the court or jury to also find "legal causation" because it too depends largely on *foreseeability*.

That leaves the last remaining element of negligence liability: *breach* of the duty, a jury determination. *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278 ("T]he elements of breach of . . . duty and causation are ordinarily questions of fact for the jury's determination."). But where a jury is confronted with findings of duty, damages and causation per the above described "toppling" of these elements in asbestos exposure claims, "breach" seems a forgone conclusion; how else explain why a plaintiff who is owed a duty by defendant and who suffered damage as a result of what defendant did or did not do respecting that duty, could end up in the position she finds herself absent breach? Ergo, the metamorphosis from negligence, which is the only cause of action here asserted, to absolute liability is complete; defendant's and other similarly situated defendants' fates are sealed.

Thus, the extrapolation of duty collapses the remaining negligence elements, effectively imposing absolute and limitless liability upon defendant. To avoid blurring the jurisprudential line separating viable tort claims from absolute liability, judges must employ the doctrines of duty and legal causation to assure liability is imposed in a fair, principled and uniform way. This case presents an opportunity for the Court to do just that by providing needed clarity and certainty on whether and why (or why not) a duty

is owed by employers to family members of employees who are secondarily exposed to asbestos dust from the employee's take-home work clothes.

PROCEEDINGS BELOW[8]

Lynn Haver contracted mesothelioma as a result of her secondary exposure to asbestos. Her former husband, Mike Haver, was employed by the Santa Fe Railway, the predecessor to defendant BNSF Railway Company in the 1970's. He was exposed numerous times during the course of his employment on BNSF's premises to products and equipment containing asbestos. The asbestos adhered to his clothing and was transferred to the couple's home, where Lynn was exposed.

Lynn was at all times unaware of the hazardous conditions or the risk of personal injury and death to those working in the vicinity of products and materials containing asbestos, and was not aware of the effects of secondary exposure to her own well-being. BNSF knew of the danger of asbestos exposure, including secondary exposure to the spouses of its employees, but failed to abate the dangerous conditions on its premises or warn Lynn of their existence.

Lynn inhaled asbestos fibers as a result of her direct and indirect contact with her husband, his clothing, tools, vehicles, and general surroundings. As a proximate result of her exposure to asbestos, Lynn suffered severe and permanent injuries including throat cancer and progressive lung disease, from which she died.

[8] This statement of facts is taken from the appellate opinion. The facts are not in dispute because they are deemed true when, as here, the trial court sustained defendant's demurrer.

SUMMARY OF ARGUMENT

The role of "duty" in negligence law, which is exclusively the province of courts to decide, is to fix the legal standard applicable to the defendant's conduct. Duty rulings must, therefore, be categorical. They must set the standard of care owed by some class of potential injurers – common carriers, or ski lift operators, or sellers of prescription drugs or, as here, employers and business owners – to a class of potential plaintiffs.

In establishing categorical rules of duty, courts cannot, of course, anticipate every future dispute that may arise, but neither, if duty is to mean anything of practical value, must the category devised be so general that all courts can do under it is hand-off the determination of a defendant's liability to the jury. That would amount to an abdication of judicial responsibility, resulting in clogged courts where every negligence claim gets submitted to a jury. No, courts should and must provide boundaries, "bright lines" demarcating whether in a given category of cases involving similarly situated plaintiffs and defendants, the defendants owe a duty to the plaintiffs.

Accordingly, courts have – from the felt necessities of the times – devised a variety of duty categories based on a weighing of factors pertinent to duty, known as the *Rowland* factors from the name of the plaintiff in the opinion that identified criteria to aid courts and counsel in duty determinations. Not all seven *Rowland* factors must accompany every duty determination, nor are any to be necessarily accorded greater or equal weight with all the others. Neither are these factors exhaustive of what a court may consider.

In this take-home asbestos exposure case, several *Rowland* factors (as most recently limned in an analogous case to this one by the appellate opinion in *Campbell*)

tip the scales in favor of a "no duty" ruling – the closeness of the connection between the plaintiff and defendant, the extent of the burden to defendant, the consequences to the community if the court imposes on defendant a duty of care toward plaintiff, the moral blame attached to defendant's conduct toward plaintiff, and the policy of preventing future harm. Plaintiff has no connection to defendant; she never worked for, used a product made by, or visited the premises of defendant. Her sole connection to defendant is through her ex-husband, an employee of defendant, who brought home asbestos dust on his work clothes. The moral blame that attends ordinary negligence is generally not sufficient to warrant creation of duty. Imposing a duty on defendant under these circumstances would be an unfair burden that, in terms of consequences to the community, defies any bright line boundary of liability. It would result in absolute liability based on a notion of forseeability that requires defendants to foresee forever and would not prevent future harm as defendant and others similarly situated long-ago ceased to expose their workers to asbestos.

ARGUMENT

I. EMPLOYERS SHOULD NOT HAVE A DUTY TO PROTECT THOSE WHO ARE NEITHER EMPLOYEES NOR VISITORS TO THE EMPLOYER'S PREMISES FROM TAKE-HOME EXPOSURES TO ASBESTOS DUST ON THEIR EMPLOYEES' WORK CLOTHES.

Of all common law defenses to negligence claims, absence of *duty* is the best known and most frequently asserted. Indeed, "duty" is an essential element in every negligence action, and plaintiffs have the burden of demonstrating its existence. For negligence claims, a plaintiff must show a defendant's legal duty to a plaintiff to conform to a standard of care, a breach of that duty (negligence), and damages *caused* (both factually and legally) by the breach. *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465,

477. Some of these issues, *i.e.*, breach, factual foreseeability (cause-in-fact) and damages, are the exclusive province of the jury; the two others – duty and sometimes legal causation – are the responsibility of the court.

"The threshold element of a cause of action for negligence is the existence of a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." *Paz v. State of California* (2000) 22 Cal.4th 550, 559. Whether this prerequisite to a negligence cause of action has been satisfied is a question of law to be resolved by the court, *not* the jury. As the Court stated in *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925 (*Hoff*): "To say that someone owes another a duty of care 'is a shorthand statement of a conclusion, rather than an aid to analysis in itself. . .. Duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.' " [Citation.] "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." *Id.* at 933.

Under *Rowland*,[9] foreseeability of the "risk of harm" is one factor the court considers in determining whether a defendant owes the plaintiff a tort duty. However,"foreseeability, when analyzed to determine the evidence or scope of duty, is a question of law to be decided by the court." *Ericson v. Federal Express Corp.* (2008) 162 Cal.App.4th 1291, 1300.

[9] *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*). See discussion *post* at pp. 14-18.

That duty should not be determined by foreseeability of the risk of harm alone is underscored by *Thing v. LaChusa* (1989) 48 Cal.3d 644, which cautioned when tightening the test for recovery by third parties for their negligently inflicted emotional distress that "there are clear judicial days on which a court can foresee forever and thus determine liability, but none on which that foresight alone provides a socially and judicially acceptable limit on recovery of damages for [an] injury." *Id.* at 668. This same concern was reiterated in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370: "Policy considerations may dictate a cause of action should not be sanctioned *no matter how foreseeable* the risk . . . for the sound reason that the consequences of a negligent act must be limited in order to avoid an intolerable burden on society." *Id.* at 399, quoting *Elden v. Sheldon* (1988) 46 Cal.3d 267, 274; emphasis added.

A compelling reason for courts to eschew the equation of *foreseeability* with *duty* under negligence law is:

> If the foreseeability formula were the only basis of determining both duty and its violation, such activities as some types of athletics, medical services, construction enterprises, manufacture and use of chemicals and explosives, serving of intoxicating liquors, operation of automobiles and airplanes, and many others would be greatly restricted. Duties would be so extended that many cases now disposed of on the duty issue would reach a jury on the fact issue of negligence.

Leon Green, *Foreseeability in Negligence Law* (1961) 61 *COLUMB. L. REV.* 1401, 1417-18. That, unfortunately, is the position plaintiff and the dissenting appellate urge happen here contrary to this Court's sound authority. See, e.g., *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 774-784 [rejecting claimed exception to duty of care for stopping alongside a freeway]; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472-478

[recognizing exception to duty of care for normal operation of garbage truck near bridle path]; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, 1185 [operators of commercial parking garages had no duty to take precautions against criminal activity in the absence of similar crimes in the past, rejecting contention that a string of robberies was sufficiently similar to plaintiff's rape to impose a duty]; and *Nicole M. v. Sears, Roebuck & Co.* (1999) 76 Cal.App.4th 1238 [defendant owes no duty toward a patron who is victim of attempted assault in defendant's parking lot absent prior criminal attacks]. "[F]oreseeability may be present in cases in which there are good grounds nevertheless to deny liability . . . where for other reasons of policy, liability is foreclosed or limited." W. Jonathan Cardi & Michael D. Green, *Duty Wars* (2008) 81 *S. CAL. L. REV.* 671, 678.

A. "Duty" in the Circumstances of this Case Cannot be Determined from a Specific Statute; this is not Negligence Per Se.

"Duty" is not found "in the air;" it derives from a "special" or "contractual" relationship between the parties, by specific statute (negligence *per se*), or by court determination based on the alleged facts of each case. Only the last of these approaches applies here. There is no "special" or "contractual" relationship between defendant and plaintiff, and plaintiff does not contend otherwise.

Plaintiff does argue, however, that a statutory duty finds expression in Civil Code section 1714, enacted more than 140 years ago to provide that "[e]veryone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person . . .." Petitioner's Opening Brief on the Merits, p. 14. But this implied backdoor assertion of negligence per se will not wash. As *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804 explained when interpreting the language of section 1714 to provide for comparative fault, though it had consistently

been held for more than a century to instead provide for the quite different all-or-nothing defense of contributory negligence:

> [I]t was not the intention of the Legislature in enacting sections of th[e civil] code declarative of the common law, to insulate the matters therein expressed from further judicial development; rather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution.

Li, *supra*, 13 Cal.3d at 814.

"Continuing judicial evolution" has made it abundantly clear that absent a special relationship or contractual source for finding duty, courts rely on reason and the guidance of published opinions limning what constitutes a common-law "duty" owed by a defendant to a third-party plaintiff. Section 1714 merely codifies the general common law principle that persons should use due care in their conduct toward others; but that is universal in scope and not specific enough to constitute a basis for negligence per se. No California statute specifies responsibilities that employers who manufacture or use asbestos products in their business, or landlords who lease their property to such employers, owe to family members of their employees when the family members have no direct contact with the employer, manufacturer or landlord. For a statute to serve as the basis for a claim of negligence per se, "not only must the injury be a proximate result of the statutory violation, but the plaintiff must be a member of the class of persons the statute . . . was designed to protect, and the harm must have been one the statute . . . was designed to prevent." *Stafford v. United Farm Workers* (1983) 33 Cal.3d 319, 324. If one is not within the protected class or the injury did not result from an

occurrence of the nature which the transgressed statute was designed to prevent, Evidence Code section 669, the basis for negligence per se, has no application. There is simply no negligence per se here. *Mark v. Pacific Gas & Electric Co.* (1972) 7 Cal.3d 170, 183.

B. In Determining Defendant's Duty for Take-Home Asbestos Exposure to others from the Employee's Work Clothes, the Most Important Factor Should be the Closeness of the Relationship Between the Defendant and Plaintiff.

Campbell v Ford Motor Co. (2012) 206 Cal.App.4th 15 (*Campbell*) is especially instructive here for how it addressed the issue of "whether a premises owner has a duty to protect family members of workers on its premises from secondary exposure to asbestos during operation of the property owner's business," and concluded there was "no duty" owed plaintiff. *Id.* at 29, fn. omitted. *Campbell* defined "workers" to include employees of the property owner and those employed by independent contractors to work on the premises of the owner. The plaintiff in *Campbell*, similar to the plaintiff here, claimed she contracted mesothelioma as a result of her secondary exposure to asbestos, which occurred when she shook out and laundered her father's and brother's work clothes. In reaching the conclusion of "no duty," *Campbell* applied the factors for determining duty listed in *Rowland*, *supra*, 69 Cal.2d 108,[10] as further clarified in *Cabral*

[10] *Rowland* identified seven considerations that, when balanced together, may justify a departure from the general "duty of care" principle embodied in Civil Code section 1714: "the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." *Id.* at 113.

v. Ralphs Grocery Co., *supra*, 51 Cal.4th 764.[11]

With respect to the first three *Rowland* factors – *i.e.*, foreseeability of harm to the plaintiff, degree of certainty the plaintiff suffered injury, and closeness of the connection between the defendant's conduct and the injury suffered, *Campbell* reiterated that foreseeability alone was insufficient to impose a duty. *Campbell, supra,* 206 Cal.App.4th at 29-31. Defendant acknowledged the second factor that plaintiff suffered asbestos-caused harm. *Id.* at p. 29. But, even if it were foreseeable to defendant that workers on its premises could be exposed to asbestos dust and fibers, the third factor addressing the "closeness of the connection" between defendant's conduct of hiring and failing to supervise a general contractor and the injury to a worker's family member off the premises was too "attenuated" to impose a duty. *Id.* at 31.

Underscoring that "duty" is a combination of foreseeability of the risk and a weighing of public policy considerations, *Campbell* addressed the remaining factors outlined in *Rowland,* and concluded that "strong public policy considerations counsel against imposing a duty of care on property owners for such secondary exposure." *Campbell, supra,* 206 Cal.App.4th at 32. Defendant Ford's conduct in failing to warn the plaintiff spouse of its employee about the risk of injury from exposure to take-home asbestos on his clothing did not rise to the level of moral culpability sufficient to impose liability. *Ibid.* As *Adams v. City of Fremont* (1998) 68 Cal.App.4th 243 explained, "To avoid

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[11] *Biakanja v. Irving* (1958) 49 Cal.2d 647 also lists a catalog of factors to be employed in determining whether a duty exists under a given set of circumstances that is instructive here: "[T]he extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm." *Id.* at 650.

redundancy with the other *Rowland* factors, the moral blame that attends ordinary negligence is generally not sufficient to tip the balance of the *Rowland* factors in favor of liability." *Id.* at 270. Ordinary negligence is all that is at issue in this case.

The next two *Rowland* factors – *i.e.*, the extent of the burden to the defendant, and the consequences to the community if the court imposes on defendant a duty of care toward the plaintiff – weighed heavily against the plaintiff in *Campbell* and does so here as well. *Campbell, supra*, 206 Cal.App.4th at 32. *Campbell* noted that the difficulty with these factors is in drawing the line between persons to whom a duty is owed and those to whom no duty is owed. Relying on the analysis in *Oddone v. Superior Court* (2009) 179 Cal.App.4th 813, 822, which describes the quandary of determining the scope of duty owed those secondarily exposed to toxic chemicals, *Campbell* stated, "in a case such as [this], where the claim is that the laundering of the worker's clothing is the primary source of asbestos exposure, the class of secondarily exposed potential plaintiffs is far greater, including fellow commuters, those performing laundry services and more." *Campbell, supra,* 206 Cal.App.4th at 32-33. Imposing such a duty would create a burden that is uncertain and potentially large in scope. *Id.* at 33.

Campbell also cited with approval cases from other jurisdictions that have rejected the imposition of a duty on premises owners for secondary asbestos exposure, recognizing that tort law must draw a line between the competing policy considerations of providing a remedy to everyone injured versus extending limitless liability. *Id.* at 34. Accordingly, *Campbell* declined to impose a duty on the premises owner for reasons equally applicable here.

It is for the aforementioned reasons that

> [M]ost of the courts which have been asked to recognize a duty to warn household members of employees of the risks associated with exposure to asbestos conclude that no such duty exists. In jurisdictions where the duty analysis focuses on the relationship between the parties, "the courts *uniformly* hold that an employer/premises owner owes *no* duty to a member of a household injured by take home exposure to asbestos." These courts include the Supreme Courts of Delaware, Georgia, Iowa, Maryland, Michigan, and New York; appellate courts in California and Illinois; and federal and state courts interpreting Pennsylvania law.

Victor E. Schwartz & Mark A. Behrens, *Asbestos Litigation: the "Endless Search for a Solvent Bystander"* (2013) 23 *WIDENER L.J.* 59, 80-81; footnotes and citations omitted. See also authorities cited and discussed in Answer Brief on the Merits, pp. 46-49.

Plaintiff tells us these jurisdictions are out-of-step with California because the *Rowland* factors comprising "duty" do not expressly mention the "relationship" of the parties to each other, and the facts animating *Rowland* show it did away with the common law "status" categories of invitees, licensees and trespassers with respect to those coming onto another's property. But this is a misreading of *Rowland*. "Status" is a species of relationship; but abolition of the common-law "status" of historically generated "categories" of those coming onto another's land as a basis for determining the landowner's duty to them does not negate the importance of the parties' relationship to the determination of duty. The relationship at play in *Rowland* was between the landowner and those injured while on his or her property. That "relationship" is direct and close. Here, in contrast, plaintiff had no direct, close relationship with defendant. She was, according to the complaint, never on defendant's property, never used a

product made by defendant, and was never employed by defendant. Her only contact with defendant was indirect, through her husband, an employee of defendant. In short, plaintiff's relationship with defendant was not one of "close connection," but "remote" and "attenuated."

Nor does "the policy of preventing future harm" factor into this kind of case. Defendant and most others similarly situated ceased long ago to use or work with asbestos or expose its workers to asbestos. Plaintiff's exposure took place some 40 years ago. Imposing a duty on defendant and those similarly situated to warn family members of their employees about the risks of exposure to asbestos dust from the employees' take-home work clothes would be to require them to do an idle act insofar as protecting anyone from future harm. See discussion on this point in *Taylor v. Elliott Turbomachinery Co.* (2009)171 Cal.App.4th 564, 595.

Rowland and its progeny also make clear that the seven listed factors are not the only ones pertinent to a determination of duty nor must all of them be considered in every case. "This lengthy list of policy considerations . . . is neither exhaustive not mandatory." *Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 728. *Accord*: *Goodman v. Kennedy* (1976) 18 Cal.3d 335, 343-344 (attorney owed no duty to non-client third parties who detrimentally relied on his advice); *Hoff*, *supra*, 19 Cal.4th 925. This Court should clarify that the importance of the "closeness of the connection" criterion between plaintiff and defendant, making clear that their relationship to each other is of paramount importance in determining duty.

C. A Majority of Courts throughout the Nation Reject the Imposition of a Duty on Employers to Non-Employees for Exposure to Asbestos and Other Toxins from the Take-Home Clothes of their Workers, and Scholarly Legal Commentary is Generally Critical of Attempts to Impose such a Duty.

"Although holdings from other states are not controlling, and we remain free to steer a contrary course, nonetheless the near unanimity of agreement by courts considering very similar [extensions of duty owed by employers to those exposed to toxins from the take-home work clothes of employees] . . . indicates we should question the advisability" of holding the opposite. *Moradi-Shalal v. Fireman's Fund Ins. Cos.* (1988) 46 Cal.3d 287, 298 (reversing third-party bad faith actions against insurance companies previously permitted by *Royal Globe Ins. Co. v. Superior Court* (1979) 23 Cal.3d 880).

Opinions from six other state high courts and five federal courts from separate jurisdictions hold that for sound public policy reasons imposing a duty to protect against take-home toxic exposures is not warranted. See citation to and discussion of cases in ABM, pp. 46-49.[12]

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[12] The highest courts of Georgia, New York, Michigan, Delaware, Iowa, and Ohio have rejected take-home exposure claims, *see Riedel v. ICI Ams. Inc.* (Del. 2009) 968 A.2d 17; *CSX Transp., Inc. v. Williams* (Ga. 2005) 608 S.E.2d 208, 210; *Van Fossen v. MidAmerican Energy Co.* (Iowa 2009) 777 N.W.2d 689; *Miller v. Ford Motor Co.* (*In re* Certified Question from the Fourteenth Dist. Ct. App.) (Mich. 2007) 740 N.W.2d 206, 216; *Holdampf v. A.C. & S., Inc.* (*In re* N.Y. City Asbestos Litig.) (N.Y. 2005) 840 N.E.2d 115, 116; *Boley v. Goodyear Tire & Rubber Co.* (Ohio 2010) 929 N.E.2d 448; *see also Rindfleisch v. Alliedsignal. Inc.* (*In re* Eighth Judicial Dist. Asbestos Litig.) (N.Y. Sup. Ct. 2006) 815 N.Y.S.2d 815, 820-21; along with state appellate courts in Texas and Maryland, *see ALCOA, Inc. v. Behringer* (Tex. App. 2007) 235 S.W.3d 456, 462; *Adams v. Owens-Illinois, Inc.* (Md. Ct. Spec. App. 1998) 705 A.2d 58, 66; a federal appellate court applying Kentucky law, *see Martin v. Cincinnati Gas & Elec. Co.* (6th Cir. 2009) 561 F.3d 439, 441: and a federal district court applying Pennsylvania law, *see Jesensky v. A-Best Prods. Co.* (W.D. Pa. Dec. 16, 2003) No. CIV A 96-680, 2003 WL 25518083 (issuing a magistrate opinion recommending grant of summary judgment to Duquesne Light Co.), *adopted by*, No. Civ.A. 96-680, 2004 WL 5267498 (W.D. Pa. Feb. 17, 2004), *aff'd on other grounds*, 287 Fed. Appx. 968 (continued...)

The breadth of criticism leveled at attempts to impose a duty on employers to protect those who are neither employees nor visitors to the employer's premises from take-home exposures to asbestos and other toxins is instructive. It is also pertinent to this Court's consideration of the issue and whether to reverse the reasoning of the appellate opinion. See, e.g., *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 921 (scholarly criticism justified reexamination of prior opinion "to determine its continuing viability").

Commentary has been generally critical of efforts to expand the duty of employers and premises owners to protect others from exposure to asbestos on the take-home work clothes of their employees.[13] See, e.g., Victor E. Schwartz, *A Letter to the Nation's Trial Judges: Asbestos Litigation, Major Progress Made over the past Decade and Hurdles You Can Vault in the Next* (2012) 36 *AM. J. TRIAL ADVOC.* 1, 22 ("Expanding the availability of asbestos actions against premises owners for persons who were not occupationally exposed can create an almost infinite expansion of potential asbestos plaintiffs. Future potential plaintiffs might include anyone who came into contact with an exposed worker or the worker's clothes."); Mark A. Behrens & Frank Cruz-Alvarez, *A Potential New Frontier in Asbestos Litigation: Premises Owner Liability for "Take Home" Exposure Claims*, 21:11 *MEALEY'S LITIG. REP.: ASBESTOS* 15 (July 2006)(noting that

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[12](...continued)
(3d Cir. 2008). Kansas and Ohio have statutorily barred claims against premises owners for off-site asbestos exposures. *See* KAN. STAT. ANN. § 60-4905(a) (2009); OHIO REV. CODE ANN. § 2307.941(a)(1).

[13] But see, e.g., Note, *Second-Hand Asbestos Exposure: Boley v. Goodyear Tire & Rubber Co.* (2011) 37 *OHIO N.U. L. REV.* 901, 916-917: "[I]s it not generally in the public's best interest for those who cause foreseeable harm to others to be held accountable for their actions? After all, it is undisputed that take home asbestos exposure can cause asbestos-related diseases."

potential plaintiffs could include "extended family members, renters, house guests, carpool members, bus drivers, and workers at commercial enterprises visited by the worker.").[14]

CONCLUSION

The combination of California appellate opinions finding "no duty" in situations highly analogous to this case, the vast majority of courts from other jurisdictions in agreement with these "no duty" opinions, and the abundance of scholarly criticism of contrary judicial determinations, constitutes strong reason and authority for affirming the appellate court's ruling here.

Dated: March 20, 2015

Respectfully submitted,

/s/

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[14] See also: Mark A. Behrens, et al., *The Need for Rational Boundaries in Civil Conspiracy Claims* (2010) 31 *N. ILL. U. L. REV.* 37, 53 ("These 'take home' exposure claims seek to impose a duty of care in the absence of a relationship between the plaintiff and defendant; they are based on the alleged 'foreseeability' of the harm. Most courts, however, have rejected take-home exposure claims after considering the lack of a relationship between the parties and public policy concerns."); and Meghan E. Flinn, *Liability for Take-Home Asbestos Exposure* (2014) 71 *WASH. & LEE L. REV.* 707, 710 ("Take-home asbestos exposure represents a new method for prolonging asbestos litigation. Lawsuits arising from take-home asbestos exposure have been finding their way onto the dockets of state courts, which are already overwhelmed with litigation centered on asbestos.").

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Date: March 20, 2015

/s/
Fred J. Hiestand

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I, David Cooper, am employed in the city and county of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 3418 Third Avenue, Suite 1, Sacramento, CA 95817.

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 20th day of March 2015 at Sacramento, California.

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